IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 862 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

DILAVAR HUSEN @ DILUMIYA ABUMIYA SAIYAD BUKHARI

Versus

STATE OF GUJARAT

Appearance:

MR A.M.VYAS,LA for Petitioner

MR B.D.DESAI,ADDIL.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and

MR.JUSTICE A.K.TRIVEDI

Date of decision: 24/06/98

ORAL JUDGEMENT Coram: Bhatt,J.

The appellant has challenged the judgment of conviction

and order of sentence recorded against him by the learned Additional Sessions Judge, Jamnagar in sessions case No. 14 of 1988 on 28.10.1991 whereby he came to be convicted for offence under section 302 of IPC and sentenced to life imprisonment and fine of Rs. 1500/-,in default, R.I. for one year and also for offence under section 326,IPC and resultant sentence of R.I.for seven years and fine of Rs. 2,000/-,in default, to undergo R.I.for three months, by filing this appeal.

A few relevant and material facts giving rise to this appeal may be noted at the outset. The prosecution case has been that on 1.11.1987 at about 3 a.m. , the appellant-original accused committed murder of his wife Sabira in his house situated at village Dhinki of Okha Mandal taluka of Jamnagar district by strangulating her and also by firing gun shots of a licensed gun of his father. The accused was,therefore, charged on 30.4.190 in the aforesaid sessions case to which he denied and claimed to be tried.

The prosecution placed reliance on the evidence of the following witnesses:

1. Dr B.C.Jethva, ex. 7
2. Madhuabhai Ashabhai,ex. 10
3. Abumiya Musamiya,ex. 12
4. Dada Rana,ex. 13
5. Latif Ismail,ex. 14
6. BharaBhikha,ex. 15
7. Kheta Dhana,ex. 27
8. Patramal Dhadhabha ex.28
9. Subhash Jethalal,ex.30
10. Pradip Chunilal,ex.31
11. Soma Modha,ex. 34
12. MahipatsinghHanubha,ex.37
13. Rasiklal Bhagvanji,ex. 39
14. Mahendrarai Jayashanker, ex.45

The prosecution also placed reliance on the following documentary evidence to which reference may be made at appropriate stage,as and when required:

1. P.M.note,ex. 8
2. Muddamal report,ex. 9
3. Complaint ,ex. 35
4. Inquest panchnama,ex. 41

The trial court, upon assessment of the evidence and appraisal of the facts and circumstances, found the

accused guilty for the offence punishable under section 302,IPC and sentenced him to imprisonment for life and also to pay fine of Rs.1500/- and in default,to suffer R.I for one year. The trial court also held the accused guilty for the offence under section 326,IPC and sentenced him to undergo R.I. for seven years and to pay fine of Rs.2000/- ,in default, to undergo R.I. for three months. Both the sentences were directed to run concurrently. Though charge was framed under section 25 (1) (a) of the Arms Act,1959, and discussion is also found in the judgment, no specific order came to be recorded in the final order.

This is a case of circumstantial evidence.There is no direct evidence.The conviction is founded upon the circumstantial evidence by the trial court.Reliance on the circumstances by the trial court is seriously criticised by the learned advocate for the appellant.The learned Additional Public Prosecutor has supported the circumstances relied on by the trial court.

It is a settled proposition of law that conviction can be based even on circumstantial evidence in the absence of direct evidence. However, circumstantial evidence, like any other evidence, in absence of direct evidence, must be clear, consistent and showing complicity of the accused beyond reasonable doubt.The circumstantial evidence can be basis of conviction if found of such character that it is wholly inconsistent with innocence of the accused and is consistent with the guilt of the accused.The proposition of law on the aspect of circumstantial evidence has been very well expounded and extensively examined in various decisions.

Therefore, if there is no direct evidence of eye witnesses and the case is based on circumstantial evidence, conviction can be founded on circumstantial evidence, if the following conditions are established:

(i) Circumstances from which inference of guilt is sought to be drawn must be cogently established;

(ii) these circumstances unerringly pointing towards the complicity of the accused;

(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that out of human probability, the offence was committed only by the accused and none else.Thus,the circumstantial evidence in order to sustain conviction must be complete and

incapable of being of other hypothesis than that of culpability of the accused.The circumstantial evidence should not only consistent with the guilt of the accused but should be inconsistent with his innocence. The circumstantial evidence in the present case is relied on by the prosecution and the conviction is based upon the circumstances for holding the accused guilty of his complicity.

In view of our dispassionate appraisal of the circumstantial evidence and after hearing the submissions, we are of the opinion that the prosecution has successfully established the culpability of the accused for the offence punishable under section 302 in committing murder of his wife by strangulating her and also giving gun shots.

In view of the following circumstantial evidence emerging from the factual scenario successfully established by the prosecution in the present case, conviction and resultant sentence for the offence under section 302 requires to be confirmed and affirmed.The following circumstances have remained unshaken:

(i) Accused and his wife alone were in their room in their house on the night of the incident in the early morning at 3 a.m.;

(ii) Deceased Sabera and her husband were not on good terms and there was quarrel between them;

(iii) the complainant- father of the accused heard the gun shot from the room of the accused and questioned his son to open the room to which he said that Patramal,P.W. No.8 ,ex.28 and who happened to be member of the Panchayat should be called.This Patramal turned hostile;

(iv) the complainant-father of the accused ,though has not supported the prosecution case, filed complaint ex. 35 which was lodged at the earliest point of time before the police station situated at a distance of 19 K.Ms. from the venue of the incident. This radiates imprint of his truthful version narrated before the police in the complaint.

(v) there was nobody inside the room in which the deceased wife was found dead ,other than the accused,when it was opened in the presence of

Khetabhai Dhanabhai,P.W.7 , Patramal,P.W.8 and the complainant.

(vi) the topography of the venue of incident i.e. the room ,as can be seen from the sketch prepared ,produced and proved by the prosecution,at ex.11 clearly indicates that there was no scope for anybody to come inside the room of the accused in which murder of his wife was committed by him, as it has only one door leading through Osri and then to open Falia portion. The said door was bolted from inside when the gunshot was heard by the father of the accused Abumiya who is also the complainant . and on questioning his son to open the door, the accused had said that he should bring Patramal.It appears that Patramal is a leading person of the village, being leader of the Panchayat;

(vii) the version of the prosecution is fully supported by medical evidence. P.W.No. 1 Dr. B.C.Jethva, ex. 7 has testified that deceased was strangulated and had sustained gun shot.Multiple fractures of thyroid cartilage and trereheal rivys pale were possible by use of the muddamal string produced as Article 8;

(viii) it is found from the medical evidence and the post mortem report that the deceased had sustained as many as nine external injuries, over and above multlple fracture of left hand including clavicle ,and thus,the injuries were ante mortem and the cause of death was because of asphyxia due to strangulation..External injuries Nos. 1,2,3 and 4 indicated in column No. 18 of the post mortem report were multiple fractures which were possible by gun shot. Thus, the medical evidence of Dr Jethwa ex.7 and the post mortem report produced at ex.8 clearly indicate that there was homicidal death of the deceased and it was possible only because of strangulation and use of gun shot.

(ix) the circumstantial evidence in the form of extra judicial confession not totally exculpatory made by the accused in the presence of Kheta Dhana ex,27 , Patramal,ex.28 and the complainant. It may be noted that Patramal and the complainant-father of the accused have turned hostile to the prosecution case,

(x) muddamal gun used by the accused inside the room while the room was bolted from inside ,was licensed gun of his father, which has remained unshaken. The complainant-father of the accused not only has stated in his evidence that it was his gun but has also clearly stated in the complaint at the earliest point of time produced at ex. 35.Not only that, use of the said gun apart from other circumstances, is proved in the commission of offence by the accused .It is also very clear from the report of forensic science laboratory ex.21 that the gun and the cut on the clothes of the deceased mark. c/1 were examined by the senior technical assistant of forensic science laboratory,Jamnagar in whose opinion, the whole on the clothes (Jabha) of the deceased had residues of gun powder.Thus,it is proved that the hole on the cloth produced and examined at mark.c/1 by the expert of forensic science laboratory was caused by the fire arm discharged and such type of hole can be caused by muzzle loading gun like the muddamal gun which, admittedly, was of the father of the accused and it was licensed one till December 1988. Thus, the report of the forensic science laboratory supports the prosecution case that gun shot on the person of the deceased was relatable to the use of the muddamal gun.

(xi) subsequent version of the defence that the accused was, as such, in the field on the night in question is shown to be nothing but an after-thought to get out of the heinous culpability committed by the accused.

(xii) the conduct of the accused pre and post-period of incident runs diametrically opposite to his innocence. What would have been natural, spontaneous and instantaneous action on the part of innocent husband in a situation where his wife is murdered by somebody ? An innocent husband in a given situation would not leave any stone unturned so as to take immediate action by re-acting or going to the police or to neighbours or to the relatives. The conduct of the accused in the present case is one of the important circumstances pointing to the guilt and not his innocence.

It is in this factual scenario and the aforesaid circumstances that evidence of P.W.,7 Kheta Dhana,ex.27

has to be evaluated.After questioning his son -accused on hearing the gun shot in the early morning on the day of the incident, the complainant-father of the accused went to call P.W.1 Patramal , a member of the Panchayat and neighbour Kheta Dhana and carried them near the room wherein the accused and his deceased wife and nobody else were found. The room was bolted from inside and it was opened in the presence of Patramal, Kheta Dhana and Abumiya. Upon being questioned, it is clearly testified by P.W.7 Kheta in his evidence that the accused made the extra judicial confession. He was asked by Kheta Dhana as to how and why it had happened ?(in relation to killing of Sabera) and the reply came from the accused that his mind was disturbed.No doubt, extra judicial confession was made by the accused immediately after opening the room wherein the crime was committed and nobody was there except the dead body of the deceased, and in reply to the pointed question put by P.W. Kheta Dhana, it is found to be voluntary, truthful, spontaneous,unstinted , unbiased and acceptable. No doubt, it may be contended that extra judicial confession made by the accused is not in clear terms as to the charge framed against him.It may be noted that it is not the test and requirement to have any corroboration .What materially would have happened had happened. In spontaneous question about the factum of incident, a spontaneous reply from the accused being asked by the panch witness was that his mind was disturbed.This unerringly points at the complicity and undoubtedly not at the innocence. Otherwise, the reaction of an innocent husband would have been different and in natural form. This circumstance also tilts the balance heavily against the accused.

No doubt, the P.W. Patramal ,P.w No.8, ex.28 has not supported the prosecution case as he turned hostile to the prosecution version. Similarly obviously P.W.No.3 Abumiya,ex.12 ,who is the father of the accused has given go-bye to his first natural spontaneous version given in the form of statement before the police,ex. 35. However, it may be noted that evidence of hostile witness in every case cannot be condemned in its entirety. It is a settled proposition of law that even evidence of hostile witness can be considered, to an extent, as corroboration if the evidence is found acceptable in light of the record of the case. Though the above two witnesses have turned hostile to the prosecution case, it becomes unequivocal that the venue of the offence,.the room in which dead body of the deceased wife was lying, was bolted from inside and upon being questioned, it was opened by the accused and upon being further questioned,

the aforesaid extra judicial confession in corroborative terms came to be made. There was quarrel between the spouses. P.W. Abumiya,being the father of the accused had made a complaint at the earliest point of time before the police station situated at a distance of about 19 K.Ms.from the place of incident which radiates imprint of natural version of the prosecution which, no doubt, has been not supported by the complainant ,but it is obvious. The father of the accused facing capital charge ordinarily would not support the prosecution case as ordinarily, no father would like his son to be charged in a capital charge ,like the one on hand. Notwithstanding that, the complaint produced at ex. 35 recorded by the investigating officer clearly proves and establishes that at the earliest point of time, natural version was given by the father. Muddamal gun belonged to him.It was licensed one. The external injuries caused to the deceased can be possible by use of muddamal string

The prosecution case that the appellant-accused -husband of the deceased who was killed by him is,in our opinion,unerringly established by various circumstances enumerated hereinabove and in light of oral evidence of Kheta Dhana ,ex.27 supported by the medical evidence of Dr. Jethwa ,ex.7 and the report of forensic science laboratory produced at ex. 21 and the complaint produced at ex.35 which came to be lodged at the earliest point of time. The complicity of the accused for having committed murder of his wife by strangulating and also by using gun has been succinctly established without any shadow of doubt and the trial court has rightly found the accused guilty for the offence punishable under section 302,IPC and in the facts and circumstances, punishment of life imprisonment is quite justified. However, in our opinion,the conviction for offence punishable under section 326,IPC is unwarranted being surplusage and for the reason that the injuries caused on account of fire arm are in sequel of evil design of the accused in finishing his wife for which he came to be charged for offence punishable under section 302. Therefore, in our opinion, there would not arise any question of conviction for the offence under section 326,IPC for using gun and causing injuries on the left shoulder of the deceased , separately. Therefore.his conviction needs to be quashed and set aside under section 326,IPC. Incidentally, it may be mentioned that the gun used by the accused was licensed gun of his father about which there is no dispute. The licence was renewed upto December 1988 as per the evidence record. Therefore, the charge framed under section 25(1)(a) of the Arms Act,1959 should have been under section 27 in light of the prosecution case

not only for possessing it but for unauthorisedly using it.Be that as it may, this defect of framing charge or finding the accused guilty thereunder would not assume any further survival value,for the simple reason,that the appellant has been found guilty for the offence under section 302. In fact,the trial court has lost sight of this aspect and has not mentioned anything in the final order though it is incidentally mentioned in the discussion. We are also sorry to say that the manner and mode in which the approach of examining and evaluating the evidence of the prosecution is exhibited from the plain perusal of the judgment does not appear to be happy though the ultimate conclusion regarding guilt and finding the accused guilty for the offence punishable under section 302 is supportable and acceptable even in light of the circumstantial evidence which unerringly proves his guilt,but on the grounds stated by us hereinabove.

The ultimate anxiety of the court of law while dealing with the case of capital charge is to see,as to whether the person charged is clearly,evidently and without any shadow of doubt ,found to have committed complicity alleged against him? If yes, the conviction must follow and sentence ,in light of the facts,also must be given.It is also not necessary that there should be a motive. Irrespective of motive, charge can be established and even on circumstantial evidence, if the whole chain is so complete that it indicates only guilt of the accused and none else and totally inconsistent with innocence of the accused and involving only and only the accused , conviction can be founded upon such circumstances. There are many crimes committed in which there can hardly be any direct evidence. Therefore, according to the settled proposition of law,complicity of the accused can be established by the prosecution by , no doubt, even by leading circumstantial evidence, irrespective of motive and if the circumstances are established pointing out complicity of the accused without any doubt, conviction can be founded upon such circumstances even in the absence of motive, as in the present case. No doubt,this proposition of law is very well settled and extensively expounded, by catena of judicial pronouncements. But we cannot resist our temptation of placing on record the decision of the Honourable Supreme court rendered in Lekhraj vs.State of Gujarat,1998,SCC(Cr.) 704.The proposition that accused can be convicted even in absence of proof of motive upon the basis of proved chain of circumstances, is very much reinforced by this decision. The conduct of the accused also plays more important role when the court considers the circumstances establishing

the guilt of the accused.In that case, there was no direct evidence,but only circumstantial evidence showing that the accused and the deceased were found together lastly in the room which was venue of offence. It was found from the medical evidence that the death had occurred during the stay of the accused in the said house along with the deceased. In para 4 of the judgmet,it has been clearly propounded that probable time ofdeath ofthe deceased was between 24th evening and 26th morning during which the accused was found together in the said room.
In that case, upon these circumstances,it was found sufficient to prove that it was the accused who had killed the deceased , even in absence of motive. The principles of law in light of the facts,propounded in the said decision by the Honourable Apex court in Lekhraj case is squarely attracted to the facts of the present case and the view which we have taken in order to find the appellant guilty for the offence punishable under Section 302 is fully supported and reinforced.

In view of the aforesaid discussion, we have no hesitation in holding that this appeal at the instance of the appellant insofar as conviction and sentence under section 302 is concerned, is without any substance.However, sofar as the question of conviction and sentence recorded by the trial court under section 326 is concerned, it is required to be quashed and set aside and converted into acquittal for that purpose.

In the result, conviction order under section 302,IPC is confirmed.Conviction under section326,IPC and resultant order of punishment of R.I. for seven years and fine of Rs.2000/ - is quashed and set aside and the accused is held to be not guilty for the same. Amount of fine of Rs.2000/- if paid, shall be refunded . upon due verification, to the appellant-accused. No order is required to be passed insofar as charge under section 25 (1)(a) of the Arms Act,1q959 is concerned.Accordingly, the appeal is partly allowed, by maintaining conviction under section 302 and order of sentence of imprisonment of life and fine of Rs. 1500/- in default,R.I. for one year.

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